

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:MSR:MWD:OMA:TL-N-2127-00

HNCarriger

VIA FACSIMILE ONLY TO (262) 798-8302

date:

to: Chief, Examination Division, Midwest District  
Attention: Pattye Hughes

from: Associate District Counsel, Midwest District, Omaha

subject: Taxpayer: [REDACTED]  
SSN: [REDACTED]  
Years: December 31, [REDACTED]  
December 31, [REDACTED]  
December 31, [REDACTED]  
December 31, [REDACTED]  
December 31, [REDACTED]  
Validity of Forms 872  
Advisory Opinion

Fraud Reviewer Pattye Hughes has requested this office's expedited opinion on whether either of two Forms 872 submitted by the taxpayer are valid. If neither of the Forms 872 are acceptable, she requested expedited advice on her next course of action. Unless extended, the statute of limitations for assessment is [REDACTED]. For the reasons discussed below, we believe that the Service should solicit another Form 872 but could rely on the second Form 872 if the taxpayer refuses to agree to an unrestricted Form 872.

[REDACTED] did not timely file his individual income tax returns for [REDACTED] years. After a criminal investigation was started, the taxpayer late filed all of the returns and the returns were accepted as filed. The taxpayer pleaded guilty to violations of I.R.C. § 7203 for [REDACTED] of the [REDACTED] years.

The Service has already asserted the failure to file penalties [I.R.C. § 6651(a)(1)] and the failure to pay penalties [I.R.C. § 6651(a)(2)] for all [REDACTED] years. Examination does not want to assert any deficiency in tax but does want to assert the fraudulent failure to file addition to tax under I.R.C. § 6651(f). The amount of the proposed assessment under § 6651(f) is the difference between the amount of the § 6651(f) addition to tax that could be asserted based on the late filed returns plus the failure to pay penalties less the amounts of the failure to



file and failure to pay penalties that have already been assessed.

You have indicated that the \$ 6651(f) penalty is the only issue pertaining to the taxpayer's returns for [REDACTED] through [REDACTED] that remains to be resolved and assessed. The amount of the proposed assessments for each year is:

YEAR	TAX	I.R.C. § 6651(f) Fraudulent Failure to File
[REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Total	\$ [REDACTED]	\$ [REDACTED]

The first Form 872 was solicited in early [REDACTED]. The first Form 872 was signed by the taxpayer's Power of Attorney (POA) on [REDACTED]. You reviewed the procedures under which the Form 872 were solicited and determined that the procedures did not comply with I.R.C. § 6501(c)(4)(B). You determined that there was no documentation which indicated that the taxpayer had been provided a copy of a current Form Letter 907, had been provided a current Publication 1035, or had been orally advised of all of the provisions of § 6501(c)(4)(B). The first Form 872 did not restrict either the time or the issues to be extended. Based on current guidance, it is our opinion that the first Form 872 is not valid and, therefore, cannot be relied upon to support a claim that the taxpayer knowingly extended the statute of limitations.

After discovering the problems with the first Form 872, you solicited another Form 872 using procedures in apparent full compliance with § 6501(c)(4)(B). You provided an unrestricted Form 872 to the taxpayer's POA for his signature. When the second, undated, Form 872, was returned by the taxpayer, it was signed by the taxpayer but the blank in ¶ (1) for the type of tax had been changed to include an "\*" after the type of tax and now



reads "income\*". In addition, a phrase was entered below ¶ 2 which reads as follows:

\* Notwithstanding the language above, this Extension is limited to the penalty for fraudulent failure to file, only.

You are concerned that the second Form 872 may not be valid.

As indicated in IRM 121.2.22.8.2, and partially indicated in Publication 1035 (Rev. 12-1999), page 2, Restricted Consents, the Service does not enter into restricted consents until all of the following conditions exist:

- 1) The number of unresolved issues that must be covered by the restricted consent do not make it impractical to do so.
- 2) The scope of the restrictions must be clearly and accurately described for all of the unresolved issues.
- 3) The issues not covered by the restricted consent are agreed and provision is made for assessing any deficiency, or under certain situations, scheduling any overassessment (refund or credit) for the agreed issues.
- 4) The use of a restricted consent at the district level is approved by the appropriate Service representative.
- 5) (Included in the IRM but not in Pub. 1035) The language in the restricted consent is approved by District Counsel.

As to requirement 1, the only remaining unresolved issue is the fraudulent failure to file penalty under I.R.C. § 6651(f). There are no other unresolved issues that need to be included in the consent which would make it impractical to work under the restriction added to the consent by the POA. It appears to this office that it is practical for the taxpayer and Examination to work under the restriction.

As to requirement 2, we believe that scope of the added restriction is clearly and accurately described for all unresolved issues. The penalty under § 6651(f) is commonly referred to as the "fraudulent failure to file penalty". The



subparagraph title for § 6651(f) is worded "Increase in penalty for fraudulent failure to file". We considered whether you should request that a reference to § 6651(f) be added to the restrictive phrase and concluded that the restrictive phrase, as written, is sufficiently clear and accurately described. In addition, IRM 121.2.22.8.11 specifically states that code sections should not be included in the restrictive language.

As to requirement 3, the only unresolved issue is the fraudulent failure to file penalty. Since the fraudulent failure to file penalties are all based on the taxpayer's late filed returns, there are no other agreed issues that must be provided for. There are no overassessments.

As to requirement 4, the appropriate Service representative is shown in IRM 121.2.22.8.5.

As to requirement 5, this office believes that the restrictive language used in the second Form 872 is clear and accurately describes the remaining issue. There do not appear to be any consequential changes to other items based on the proposed adjustment in this matter. The fact that the second Form 872 was undated does not appear to be a problem since your date-stamp would establish that the taxpayers signed the consent before the statute date. We believe a Court would uphold the second Form 872 to the benefit of the Service. In our opinion, the second Form 872 could be relied upon if it was required.

In our opinion, then, the first Form 872 is invalid. The second Form 872 appears to be acceptable if the appropriate Service representative wants to enter into a restricted consent and reliance on the second Form 872 is required.

But, IRM 121.2.22.8.11(1)c states that each restricted consent must contain the basic restrictive statement and a description of the area(s) under consideration. The basic restrictive statement is contained in IRM 121.2.22.8.12 and use of the basic restrictive statement is discussed in IRM 121.2.22.8.12 through .15. Since the language of, and the requirement for, the basic statement is dictated by the IRM, we believe your best alternative is to solicit a third Form 872.



As to your next course of action, it appears that you have four options:

1. The best course of action is to solicit a third, unrestricted, Form 872 in accordance with current § 6501(c)(4)(B) notice procedures.
2. Another course of action is to solicit a third, restricted, Form 872 in accordance with current § 6501(c)(4)(B) notice procedures. This office approves the following restrictive language:

The amount of any deficiency assessment is limited to that resulting from any adjustment due to a fraudulent failure to file penalty including any consequential changes to other items based on such adjustment.

3. If required, you can execute the second Form 872 as a restricted consent.
4. If you cannot obtain timely agreement on a third, unrestricted, Form 872 and you do not desire to enter into a restricted consent, assess the proposed fraudulent failure to file penalties on or before [REDACTED]. As we have previously advised, a notice of deficiency is not required since I.R.C. § 6665 allows assessment of additions to tax under I.R.C. § 6651 based on the amounts on the returns. But, you should not assess the fraudulent failure to file additions without the taxpayer's consent or until counsel has reviewed and approved the proposed assessment.

If you have further questions, please call Mr. Carriger at his direct number of (402) 221-7334.

ALBERT B. KERKHOVE  
Associate District Counsel

By: \_\_\_\_\_  
HENRY N. CARRIGER  
Attorney